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UBER TECHNOLOGIES, INC.
14 and OTTOMOTTO LLC

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

18 WAYMO LLC,

Case No. 3:17-cv-00939-WHA

19 Plaintiff,

**DECLARATION OF SYLVIA
RIVERA IN SUPPORT OF
DEFENDANTS' OPPOSITION TO
MOTION TO COMPEL**

20 v.
21 UBER TECHNOLOGIES, INC.,
OTTOMOTTO LLC; OTTO TRUCKING LLC,
22
Defendants.

Date: June 23, 2017
Time: 10:00 a.m.
Ctrm: F, 15th Floor
Judge: Hon. Jacqueline Scott Corley

23 Trial Date: October 10, 2017

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1 I, Sylvia Rivera, declare as follows:

2 1. I am a member of the bar of the State of California and a partner with Morrison &
 3 Foerster LLP, counsel of record for Defendants Uber Technologies, Inc. and Ottomotto LLC
 4 (collectively, “Uber”) in this action. I am admitted to practice before this Court. I submit this
 5 declaration in support of Defendants’ Opposition to Motion to Compel Regarding Certain
 6 Outstanding Privilege Issues. I have personal knowledge of the facts stated herein and, if called
 7 as a witness, I could and would testify competently as to these facts.

8 2. Plaintiff Waymo LLC (“Waymo”) attached Uber’s privilege logs as under seal
 9 Exhibits 1-3 to the Declaration of Kevin Smith (Dkt. 637-1) (“Smith Decl.”). Exhibit 1 reflects
 10 documents from Morrison & Foerster, Exhibit 2 reflects documents from O’Melveny & Myers,
 11 and Exhibit 3 reflects documents from Uber custodians. To avoid burdening the Court with
 12 additional papers, I do not re-attach them here, but instead refer to the Smith Decl.

13 3. Uber’s privilege logs reflect various authors, senders, and recipients of the logged
 14 documents. When Uber transmitted to Waymo its initial set of privilege logs, it included in the
 15 transmittal an identification of the individuals and firms listed in the logs. I re-state that list here
 16 for the Court’s reference in evaluating the logs:

- 17 a. Uber In-House Counsel - Nicole Bartow, Jay Choi, Andrew Glickman,
 18 Todd Hamblet, Christian Lynn, Angela L. Padilla, Justin Suhr, Salle Yoo;
- 19 b. Morrison & Foerster LLP - counsel for Uber in connection with the due
 20 diligence investigation;
- 21 c. Cooley LLP - corporate counsel for Uber;
- 22 d. O’Melveny & Myers LLP - counsel for Ottomotto in the acquisition by
 23 Uber;
- 24 e. Donahue Fitzgerald LLP - counsel for Anthony Levandowski; and
- 25 f. Levine & Baker - counsel for Lior Ron.

26 4. On June 9, 2017, Uber explained to Waymo its understanding of how the June 5,
 27 2017 Order on Waymo’s Motion to Compel Production of Withheld Documents (“Order”) would
 28 affect communications on Uber’s privilege logs (Smith Decl., Ex. 4):

- a. For communications on or before April 11, 2016 (date the Put Call agreement was signed), communications between (1) Uber, its counsel or its agent Stroz, on the one hand, and, on the other hand, (2) Otto or its counsel, Mr. Levandowski or his counsel, or Mr. Ron or his counsel, are not privileged or covered by work product protection.
- b.. Similarly, on or before April 11, 2016, joint communications between Uber, Otto, and Stroz Friedberg are not privileged or covered by work product protection.
- c. The Stroz Report and its Exhibits are not privileged or covered by work product protection.
- d. Privilege and work product claims concerning communications after April 11, 2016 (other than the Stroz Report and its Exhibits) are not affected by the Order.
- e. The Order does not affect privilege and work product claims concerning communications:
 1. Between any of the parties and their separate counsel;
 2. Between Otto, Mr. Levandowski, or Mr. Ron, or their counsel; and
 3. Between Stroz, on the one hand, and Uber or Uber's counsel, on the other hand.

5. The privilege logs attached to the Smith Decl. reflect, in the last column, whether the document reflected in a particular log entry would be produced in full, produced in part (redacted), or would continue to be withheld as privileged¹, should the Order become final.

6. Exhibit 2 to the Smith Decl., which is the log for documents from O'Melveny & Myers, is an earlier version of the log that states "Produce in Full or in Part" for most entries. Uber subsequently served an updated version that differentiated between documents that would

¹ For purposes of this Declaration, I use “privileged” inclusively to refer to any protection from disclosure, including the work product doctrine.

1 be produced “in full” versus those that would be produced “in part.” Attached hereto as
 2 Exhibit A is a copy of that log, which was transmitted to Waymo’s counsel on June 15, 2017.

3 **Uber Already Addressed Waymo’s Concerns Regarding the Employee Attestations**

4 7. During the parties’ meet-and-confer exchanges, Uber addressed the concerns
 5 Waymo raised regarding employee attestations that were removed from the privilege logs and
 6 produced. (Letter Br. at 5.) When Uber initially prepared its privilege logs, it primarily followed
 7 a convention under which it logged privileged emails and attachments as a “family.” In other
 8 words, for example, where a parent email and one attachment were responsive to the March 16
 9 Order and privileged, but the other attachments were not responsive to the March 16 order, that
 10 parent email and attachment “family” were kept intact and each document was entered on the
 11 privilege log, even though some of the attachments were not responsive. In that case, the
 12 privilege descriptions used for the non-responsive documents within the “family” were based
 13 largely on the responsive communications within the “family”; the non-responsive documents
 14 were placed on the log simply to account for the fact there was an email and attachment “family.”

15 8. In response to concerns Waymo raised, Uber’s counsel undertook to remove from
 16 the privilege log it served on April 10, 2017, documents that were not responsive to the March 16
 17 Order, which included the employee attestations to which Waymo refers. It produced updated
 18 logs on or about April 27, 2017, and subsequently produced the non-responsive employee
 19 attestations as “loose” documents without the responsive and privileged parent email and without
 20 the other attachments to that parent email that were responsive and privileged. The parent emails
 21 associated with the employee attestation attachments were privileged. Attached as Exhibit B is a
 22 true and correct copy of excerpts from Uber’s privilege log for communications from Morrison &
 23 Foerster served on April 10, 2017, which Waymo references in paragraphs ¶¶ 13-18 of the Smith
 24 Declaration. (See Log No. 311 (email between Uber’s in-house counsel, Andrew Glickman to
 25 Uber’s outside counsel, Eric Tate of Morrison & Foerster, and other in-house counsel at Uber);
 26 Log No. 1455 (email between Uber’s outside counsel Eric Tate and Anna Ferrari of Morrison &
 27 Foerster, and Eric Tate’s administrative assistant Elizabeth Whittom-Crandall). Waymo does not
 28 contend that the attestations we produced were responsive to the March 16 Order.

1 9. Upon receiving the documents (attestations), Waymo complained that the
 2 attestations did not match the entries on the log that were removed. Uber explained that the
 3 descriptions were based on the entire communication, which formed the basis of the privilege,
 4 and that other entries on the privilege log more accurately described the individual attestations.
 5 The three attestations referenced in paragraph 14 of the Smith Decl. were also included elsewhere
 6 on the log, and those entries were more specific to those attachments (which were non-
 7 responsive) and reflected that the documents were “[s]tatement[s] reflecting communication[s]
 8 made in confidence by Ottomotto employee and shared pursuant to joint defense agreement to
 9 further investigation for the purpose of obtaining or giving legal advice, in anticipation of
 10 litigation, regarding due diligence for potential acquisition of Ottomotto.” (*See* Ex. B (No. 316
 11 (van den Berg), No. 317 (Grigsby), No. 318 (M. Levandowski), No. 322 (Espinosa), No. 323
 12 (Burkholder), No. 324 (Tran); Smith Decl., Ex. 11 (May 25 email).) Waymo did not challenge
 13 that description of the attestations.

14 10. In sum, the descriptions for attachments on the current log were done on a
 15 document by document basis, and Waymo’s critique was resolved.

16 **Applying Dates of Cover Emails to Attachments**

17 11. I explained to Waymo’s counsel during our telephonic meet-and-confer
 18 exchanges, including on June 14, 2017, that email attachments are listed on the privilege logs
 19 directly after their associated parent email. I also conveyed that where an attachment lacked
 20 electronic metadata setting forth its date, Uber typically used the date of the parent email to log
 21 the document. (Smith Decl., Ex. 8.) As set forth in Uber’s concurrently-filed opposition letter
 22 brief, that is the relevant date for the assertion of the privilege.

23 12. Uber is not withholding non-privileged documents that are responsive to the
 24 March 16 Order on the ground that the documents were forwarded to an attorney. For example,
 25 where a document attached to an email between Uber and its counsel was created on April 11,
 26 2016 or earlier and is not privileged under the Order (e.g., the document was created jointly by
 27 Uber and Ottomotto), Uber will produce a copy of the document with the non-privileged email
 28 from April 11 or earlier to which it corresponds if the Order becomes final.

1 13. With regard to entries 2031-33 of Smith Decl. Exhibit 1, discussed at paragraph 21
 2 of the Smith Decl., entry 2031 is a privileged email between Uber's outside counsel Eric Tate and
 3 Anna Ferrari. The documents that follow on the log are attachments to that email, and consist of
 4 an invoice and a memorandum prepared by Stroz Friedberg. If either the invoice or
 5 memorandum was created on or before April 11, 2016 and transmitted to persons who would
 6 break the privilege on or before April 11 (e.g., Ottomotto), then that invoice or memorandum
 7 would be produced with the non-privileged email from on or before April 11 to which it was
 8 attached. It would not, however, be produced with a privileged parent email exchanged between
 9 counsel for Uber. The same analysis holds true for entries 1237-1240.

10 **Use of "And/Or"**

11 14. When Uber first prepared its privilege logs, it used the term "and/or" in the
 12 "common interest" descriptions in the logs to describe documents that contained information
 13 regarding one or more of the Diligenced Employees in order to complete the logs on a timely
 14 basis. All of the Diligenced Employees (Mr. Levandowski, Mr. Ron, Don Burnette, Soren
 15 Juelsgaard, and Colin Sebern) were employees of Ottomotto LLC, which was a party to the Joint
 16 Defense and Common Interest Agreement, and thus Uber understood that the particular identity
 17 of the person at issue was not relevant to the privilege determination. The original logs contained
 18 2,511 instances of "and/or." After Waymo objected to the use of "and/or," Uber's counsel re-
 19 reviewed the documents and provided a more specific description where it could determine which
 20 employee was the subject, in a good faith effort to address Waymo's concerns. Waymo now
 21 challenges only a couple dozen entries that use "and/or," each of which are between Uber and its
 22 outside counsel, so regardless of whether the information pertains to one or more of the
 23 Diligenced Employees, those communications will remain privileged. (See Smith Decl. Ex. 1.)
 24 To the extent there is responsive, non-privileged information in documentary form (or
 25 information that is later deemed to be not privileged) that exists separate and apart from any
 26 attorney-client communication, those documents either already have been produced or will be
 27 produced in accordance if the Order becomes final.

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1 **Law Firms as Authors**

2 15. All of the privilege log entries that list one or more law firms as the authors are
 3 documents that do not readily reflect which individuals contributed to the document, even though
 4 all four firms contributed to the drafting. Waymo is well aware of the attorneys who were
 5 involved in the diligence process because their names are all over the privilege logs. The same is
 6 true for documents authored by Stroz Friedberg, where the document on its face does not reflect
 7 the identity of specific individuals. Which specific individual at the firm contributed to the
 8 drafting does not affect the privilege determination.

9 **Agreements**

10 16. Waymo's complaint about the identity of parties to an agreement was raised for
 11 the first time in this motion to compel. If it had been raised earlier, Uber could have addressed it.
 12 Entry 33 on Smith Decl. Exhibit 1 is a draft agreement that reflects Morrison & Foerster work
 13 product. Entries 1361-1364 are attachments to a privileged joint defense communication, and
 14 non-privileged versions of the contracts have already been produced.

15 **Documents With Identical Descriptions Treated Differently**

16 17. Entry 59 on Smith Decl. Exhibit 1 is draft questionnaire that reflects Morrison &
 17 Foerster work product that was only circulated to Uber, so it remains privileged even if the Order
 18 becomes final. Entry 107 on Smith Decl. Exhibit 1 is an updated version of the questionnaire,
 19 which was subsequently circulated to the joint defense team, so if the Order becomes final, this
 20 version would be produced in full. As to entry 23, it was incorrectly coded and would be
 21 produced in full pursuant to the Order because the email is between Morrison & Foerster and
 22 O'Melveny & Myers on or before April 11, 2017. As to Exhibits 9 and 11, Uber already
 23 explained the logging of the employee attestations, which is more appropriately viewed as two
 24 family groups and not 67 documents. These complaints already were addressed, and the non-
 25 responsive, non-privileged family members produced.

1 18. Attached hereto as Exhibit C is a true and correct copy of an email dated June 15,
2 2017, from Wendy Ray to David Perlson, with copies to the email aliases for Morrison &
3 Foerster LLP and Quinn Emanuel attorneys in this litigation, and Mr. Perlson's response thereto.

4 I declare under penalty of perjury that the foregoing is true and correct. Executed this 19th
5 day of June, 2017 at Los Angeles, California.

/s/ *Sylvia Rivera*
Sylvia Rivera